Supreme Court, U.S.
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No. 02-6683

In The

Supreme Court of the United States

HERNAN O'RYAN CASTRO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. If a prisoner's motion under 28 U.S.C. § 2255 is dismissed as successive, and the prisoner – rather than applying to the court of appeals for authorization to file a successive motion – appeals the dismissal on the ground that his motion is not successive, and the court of appeals then affirms the dismissal, is a petition for certiorari barred by 28 U.S.C. § 2244(b)(3)(E), which provides that a denial of authorization to file a successive application shall not be the subject of a petition for certiorari?

2. When a federal prisoner requests relief for the first time under 28 U.S.C. § 2255, is his motion subject to dismissal as a second or successive motion under § 2255 because the court, over the prisoner's objection and without notice, previously treated a *pro se* motion properly brought by the prisoner under another rule or statute as also requesting relief under § 2255?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure the proper and fair administration of justice, and the continued recognition of and adherence to the Bill of Rights in order to sustain the quality of the American system of justice.

STATUTORY PROVISIONS AND RULE INVOLVED

When petitioner moved in 1994 for a new trial based on newly discovered evidence, Federal Rule of Criminal Procedure 33 provided in pertinent part:

[1] This *amicus curiae* brief is submitted in support of petitioner Hernan O'Ryan Castro. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief. No party other than counsel authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel have made a monetary contribution to the preparation or submission of this brief.

> A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

Title 28, section 2255 of the United States Code provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> . . . .
>
> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Title 28, section 2244 of the United States Code provides in pertinent part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> . . . .
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not

be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT

Petitioner Hernan O'Ryan Castro was tried and found guilty on a two-count indictment in April 1992. J.A. 137. On July 14, 1992, a judgment of conviction was entered, and a twenty-year prison sentence was imposed. J.A. 3-5. The Court of Appeals issued an opinion affirming Castro's conviction on March 24, 1994 and denied rehearing en banc on June 15, 1994. J.A. 137-38; 26 F.3d 1123 (table). This Court denied certiorari on October 17, 1994. 513 U.S. 950.

A. Proceedings on the Motion Brought by Petitioner Under Rule 33.

On July 5, 1994, less than one month into the two-year period that Fed. R. Crim. P. 33 then provided for such motions, petitioner filed a motion under Rule 33 for a new trial on the ground of newly discovered evidence. J.A. 7. Petitioner filed the motion *pro se*. *Id.* The principal grounds for petitioner's motion were the government's failure to disclose that it had entered into a letter agreement granting testimonial immunity to an important government witness, and its failure to correct false testimony. J.A. 9-35. Petitioner sought relief under *Brady v. Maryland*, 373

U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). J.A. 9.

In opposing petitioner's motion, the government contended that "Castro's allegation of a *Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255 . . . ." J.A. 110. The government cited no authority in support of its contention. Although petitioner had not sought relief under § 2255, the government announced it had "no objection" to his motion "being considered as demanding relief under Rule 33 and 28 U.S.C. § 2255." J.A. 110.

In his reply, petitioner disputed the government's contention that his *Brady/Giglio* claim was "more properly cognizable" under § 2255. Petitioner insisted he had "filed the proper motion." J.A. 116.

The District Court denied petitioner's motion on October 28, 1994. J.A. 137. After noting that the government had said it "has no objection to defendant's motion for new trial being treated as demanding relief under both Rule 33 and 28 U.S.C. § 2255," the court said it would "consider defendant's motion as requesting both kinds of relief." J.A. 140. The court did not address whether the government was correct in asserting that the *Brady/Giglio* claim was "more properly cognizable" under § 2255. On the merits, the court noted the government's concession that three of the four requirements for relief under *Brady* were satisfied, but it ruled that petitioner had not satisfied the fourth, which requires a reasonable probability that the suppression affected the outcome. J.A. 140-41.

Petitioner appealed from the denial of his motion. As in the District Court, he sought no relief under § 2255. In a one-paragraph opinion issued on March 19, 1996, the

Court of Appeals affirmed for the reasons set forth by the District Court. J.A. 147.

B. Proceedings on the Motion Brought by Petitioner Under § 2255.

On April 22, 1997, petitioner, still proceeding *pro se*, filed a timely motion under § 2255 to vacate his sentence. J.A. 148-61. Petitioner advanced several claims of denial of effective assistance of counsel. J.A. 154-55. The District Court denied the motion on the merits on April 13, 1998 and denied a certificate of appealability. J.A. 162. In February 1999, however, the Court of Appeals granted petitioner's motion for issuance of such a certificate with respect to one of petitioner's ineffective-assistance claims. J.A. 165.

On June 13, 2000, the Court of Appeals ruled that the District Court had decided the ineffective-assistance issue under the wrong legal standard. J.A. 172. The Court of Appeals vacated the denial of petitioner's § 2255 motion and remanded with instructions to apply the correct standard, develop the facts more fully, and "examine the record to determine if this petition is successive." J.A. 172.

On remand, counsel was appointed to represent petitioner. But shortly before the start of an evidentiary hearing on the ineffective-assistance claim, the government moved to dismiss petitioner's § 2255 motion as successive, relying upon the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1217. Petitioner opposed the motion, disputing that his motion is successive. The magistrate judge held a one-day evidentiary hearing and received post-hearing briefs but later recommended that petitioner's motion be

dismissed as successive. J.A. 175-81. He reasoned that in 1994 petitioner had "asserted his right to a new trial based on alleged constitutional violations .... Specifically, petitioner alleged that the Government violated the rules enunciated in *Brady* and *Giglio* when it failed to disclose exculpatory evidence and used perjured testimony." J.A. 180. In the judge's view, because "petitioner's claims were based on his constitutional rights to due process," they "were more properly raised in a 28 U.S.C. § 2255 motion." J.A. 180. No case law or other authority was cited in support of that determination.

The District Court adopted the magistrate judge's report and recommendation, added a few comments of its own, and dismissed petitioner's motion as successive. J.A. 182-85. According to the court, petitioner had been "put on notice by the Government's response to his motion for a new trial, filed under Federal Rule of Criminal Procedure 33, that his motion should be construed as a motion under § 2255 because of the constitutional claims that Petitioner raised in his motion." J.A. 183. No precedent for so construing the motion was cited. Although in 1994 petitioner had begun his argument in reply by referencing the government's contention about § 2255 and then insisting he had "filed the proper motion," J.A. 116, the District Court faulted petitioner for "never object[ing] to the characterization of his motion as one under § 2255." J.A. 183.

The District Court granted a certificate of appealability on one issue: whether Castro's 1997 motion is a successive motion. J.A. 186. Petitioner did not apply for authorization to file a successive motion but instead through his appeal challenged the District Court's ruling

that his motion was successive. *See* Brief of Appellant Hernan O'Ryan Castro, No. 01-12181 (June 8, 2001).

On January 2, 2002, the Court of Appeals issued an opinion that, had it not been withdrawn, would have vacated the District Court's dismissal. J.A. 188-97. "O'Ryan Castro's Rule 33 motion for new trial asserted a cognizable ground for relief," the court noted. J.A. 196. "The motion was based upon alleged new evidence, which Rule 33 explicitly provides as a basis for bringing such a motion." J.A. 196. Moreover, in his *pro se* reply in support of his 1994 motion, petitioner had "made the effort to reply in a manner that reaffirmed his intent to move for a new trial under [Rule 33] rather than seek habeas relief." J.A. 196. The court held that petitioner's 1997 motion was not a successive § 2255 motion because "a district court's re-characterization of a petitioner's initial postconviction motion will not be considered a 'first' habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such recharacterization." J.A. 197.

The government did not request rehearing or rehearing en banc. Nevertheless, the Court of Appeals withheld issuance of its mandate. Eventually, on May 7, 2002, a divided panel vacated the prior opinion *sua sponte* and substituted an opinion affirming the dismissal of petitioner's motion as successive. J.A. 198-208.

This time, the panel majority emphasized that "when [petitioner] filed his motion for new trial pursuant to Rule 33 based upon newly discovered evidence, the District Court recharacterized his Rule 33 motion as both a motion for a new trial and a § 2255 motion." J.A. 200-01. According to the new opinion, "O'Ryan Castro's claims were based upon his constitutional right to due process and

were more properly raised in a § 2255 petition." J.A. 201. The opinion cited no authority supporting that conclusion. But declaring that "[d]istrict courts have always had the power to recharacterize pro se petitioners' motions," *id.*, the panel majority deemed petitioner's 1997 motion under § 2255 a successive motion. J.A. 202-04. Judge Roney dissented. J.A. 207-08.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction to review the decision of the Court of Appeals. Petitioner does not seek review of the denial of authorization to file a successive motion; he seeks review of the ruling that his motion was successive. Title 28, section 2244(b)(3)(E) of the United States Code provides only that the grant or denial of authorization to file a successive application shall not be the subject of a petition for certiorari.

II. The Eleventh Circuit was demonstrably wrong in ruling that petitioner's 1997 motion was an impermissible second or successive motion under § 2255. Section 2255 by its terms restricts only the filing of "[a] second or successive *motion* . . . ." (Emphasis added). The restriction plainly applies only to a second or successive motion under § 2255. For three reasons, petitioner's 1994 motion was not a motion under § 2255, and therefore his 1997 motion was his first motion under that statute.

First, petitioner filed his 1994 motion solely under Rule 33. When challenged by the government, he did not acquiesce in having his motion considered under § 2255 but rather insisted he had filed the proper motion. For the fundamental reason that petitioner requested no relief

under § 2255, he cannot be said to have made a "motion" under § 2255. The court may have imputed to him a request for relief under that statute, but he did not move for relief under it.

Second, it was entirely proper for petitioner to bring his 1994 motion solely under Rule 33. When *Brady* and *Giglio* claims are predicated on newly obtained proof as was the case here, they can be raised under Rule 33 in a motion for new trial based on newly discovered evidence. *See, e.g.*, *United States v. Runyan*, 290 F.3d 223, 246-47 (5th Cir. 2002); *United States v. Josleyn*, 206 F.3d 144, 151-52 (1st Cir. 2000); *United States v. Frost*, 125 F.3d 346, 382 (6th Cir. 1997); *United States v. Kelly*, 790 F.2d 130, 135 (D.C. Cir. 1986). Indeed, in *Giglio* itself, the defendant sought relief, and eventually obtained it in this Court, by filing exactly such a motion. 405 U.S. at 152. Whether or not courts have any latitude to recharacterize, as § 2255 motions; motions that are *improperly* brought under another rule or statute, there is no justification for recharacterizing, over the prisoner's objection, a motion *properly* brought under another rule or statute.

Third, the court never put petitioner on notice that, if he proceeded with his motion, he would be deemed to have moved for relief under § 2255. Even if petitioner's reliance on Rule 33 had been mistaken, under no reasonable interpretation of AEDPA's restrictions on second or successive motions can a prisoner's motion for relief under another rule or statute be deemed a motion under § 2255, in the absence of (1) notice of the court's intention to recharacterize his motion as one under § 2255, and (2) voluntary action by the prisoner in proceeding forward after having received such notice. *See Morales v. United States*, 304 F.3d 764, 767 (8th Cir. 2002); *United States v. Palmer*, 296 F.3d 1135, 1146 (D.C. Cir. 2002); *In re Shelton*, 295 F.3d 620, 622 (6th Cir. 2002); *United States v. Emmanuel*, 288 F.3d 644, 649 (4th Cir. 2002); *Henderson v. United States*, 264 F.3d 709, 710 (7th Cir. 2001); *United States v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000); *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000); *United States v. Miller*, 197 F.3d 644, 650-52 (3d Cir. 1999); *Adams v. United States*, 155 F.3d 582, 584 (2d Cir. 1998).

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE ELEVENTH CIRCUIT'S RULING THAT PETITIONER'S 1997 MOTION IS A SUCCESSIVE MOTION UNDER § 2255.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the Court of Appeals. That conclusion is dictated by the language of § 2244(b)(3)(E) and is supported as well by this Court's decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

By its terms, the provision in § 2244(b)(3)(E) that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application . . . shall not be the subject of a petition for rehearing or for a writ of certiorari" does not apply to the ruling of the Court of Appeals in this case. Whether or not that provision deprives this Court of jurisdiction to review, on a writ of

certiorari, a denial of authorization to file a successive motion under § 2255,[2] petitioner does not seek review of such a denial. Instead, petitioner seeks review of the ruling of the Court of Appeals that his motion is successive.

Whether petitioner's motion is successive was the sole issue before the Court of Appeals. Indeed, the sole issue on which petitioner was granted a certificate of appealability was whether his 1997 motion is successive. J.A. 186. Petitioner has consistently contended that his motion is not successive, and therefore he has never applied for authorization to file a successive motion. Nothing in the language of § 2244(b)(3)(E) suggests that it affects this Court's jurisdiction to review the Eleventh Circuit's ruling

[2] Section 2255 provides that "[a] second or successive motion must be certified as provided in section 2244 ...." It is thus clear that a second or successive motion under § 2255 requires authorization of the appropriate court of appeals. It is not clear, however, that § 2244(b)(3)(E) applies to the grant or denial of authorization for a federal prisoner to file a successive motion under § 2255, as opposed to the grant or denial of authorization for a state prisoner to file a successive application under 28 U.S.C. § 2254. Section 2244(b) does not itself refer to § 2255 but only refers to applications under § 2254. *See* 28 U.S.C. § 2244(b)(1) & (2); *see also Felker v. Turpin*, 518 U.S. 651, 658-59 (1996) ("Section 2244(b)(3) prevents this Court from reviewing a court of appeals order denying leave to file a second habeas petition by appeal or writ of certiorari."). Moreover, although the last paragraph of § 2255 provides that second or successive motions under § 2255 must be certified as provided in § 2244 to contain one of the matters described in the last paragraph of § 2255, Congress did not specify that grant or denial of such certification shall not be the subject of a petition for certiorari. And review on writ of certiorari of a denial of certification to file a second or successive § 2255 motion does not implicate the federalism or comity concerns implicated when federal habeas corpus review of a state court judgment is prolonged.

that petitioner's 1997 motion is successive. That provision eliminates certiorari jurisdiction with respect to "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application ... ," not with respect to a ruling that an application is or is not a second or successive application.

In *Martinez-Villareal*, this Court considered whether § 2244(b)(3)(E) deprived it of jurisdiction to review the Ninth Circuit's holding that the § 2244(b) restrictions on successive petitions did not apply to a habeas corpus petition that challenged only the petitioner's competency to be executed. The Court held that its jurisdiction was not affected by § 2244(b)(3)(E):

> If the Court of Appeals in this case had granted respondent leave to file a second or successive application, then we would be without jurisdiction to consider the petitioners' petition and would have to dismiss the writ. This is not, however, what the Court of Appeals did. The Court of Appeals held that the § 2244(b) restrictions simply do not apply to respondent's *Ford* [*v. Wainwright*, 477 U.S. 399 (1986),] claim, and that there was accordingly no need for him to apply for authorization to file a second or successive petition. We conclude today that the Court of Appeals reached the correct result in this case, and that we therefore have jurisdiction to consider petitioners' petition.

523 U.S. at 641-42.

In this case, as in *Martinez-Villareal*, the issue decided by the Court of Appeals was whether the § 2244(b) restrictions apply, not whether to authorize a successive application. "If the Court of Appeals in this case had

[denied petitioner] leave to file a second or successive application, then [this Court] would be without jurisdiction to consider the [Castro's] petition and would have to dismiss the writ." 523 U.S. at 641. But as in *Martinez-Villareal*, "[t]his is not . . . what the Court of Appeals did." *Id.* Petitioner never requested leave to file a second or successive application but instead pressed his contention that his motion was not a second or successive motion. The Court of Appeals held that it was a second or successive motion, but that holding was error. *See* Part II, *infra*. An erroneous invocation of the § 2255 restrictions on second or successive motions cannot shut the door to a petition for certiorari, for § 2244(b)(3)(E) only precludes review on writ of certiorari of "[t]he grant or denial of an authorization by a court of appeals to file *a second or successive application* . . . ." (Emphasis added). Petitioner's 1997 motion was not "a second or successive application," and petitioner neither sought nor was required to seek authorization to file such an application. Section 2244(b)(3)(E) therefore does not apply.

II. THE RECHARACTERIZATION OF PETITIONER'S RULE 33 MOTION AS A § 2255 MOTION DOES NOT JUSTIFY DISMISSAL OF HIS FIRST REQUEST FOR RELIEF UNDER § 2255 AS SUCCESSIVE.

The Court of Appeals erred in ruling that, when petitioner in 1997 requested for the first time that he be granted relief under § 2255, his motion was nevertheless a successive motion under the statute.

A. In 1994, Petitioner Requested No Relief Under § 2255.

Analysis should begin with the language of the statute. *See Duncan v. Walker*, 533 U.S. 167, 172 (2001). Section 2255 restricts only the filing of "[a] second or successive *motion* . . . ." (Emphasis added). Congress could have imposed restrictions on a second or successive consideration by a federal district court of a prisoner's entitlement to relief under § 2255. But that is not what Congress did. It chose only to limit the filing of multiple motions under the statute.

Under the ordinary definition of a "motion," petitioner's 1994 filing was not a motion under § 2255. BLACK'S LAW DICTIONARY (7th ed. 1999) defines a motion as "[a] written or oral application requesting a court to make a specified ruling or order." *Id.* at 1031; *see also* BLACK'S LAW DICTIONARY 1013 (6th ed. 1990) (defining "motion" as "[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant"). In 1994 petitioner did not request any relief under § 2255, insisted upon proceeding under Rule 33, and thus did not make a motion under § 2255, as the term "motion" is ordinarily understood.[3]

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[3] *See, e.g.*, *Raineri*, 233 F.3d at 100 ("The petitioner's original motion was not premised upon section 2255 at all, but, rather upon Rules 33 and 35. Having dictated the terms of engagement, the petitioner was entitled to have his motion decided as he had framed it."); *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994) ("[W]e decline to construe Defendant's Rule 32 motion as a § 2255 motion because it is apparent . . . that Defendant did not intend the motion to be so construed.").

B. It Was Completely Proper for Petitioner To Bring His 1994 Motion Solely Under Rule 33.

One may assume for the sake of argument that in some circumstances, even though a prisoner had never before requested any relief under § 2255, a court nonetheless might be permitted to treat his first request for relief under that statute as "[a] second or successive motion . . . ," on the ground that the rule or statute invoked by the prisoner in a prior motion was not applicable and therefore the motion could only have been brought under § 2255. In this case, however, that assumption takes the government nowhere, for *petitioner's 1994 motion was properly brought under Rule 33.*

A motion under § 2255 to vacate a sentence or conviction and a motion under Rule 33 for a new trial based on newly discovered evidence are "separate and distinct means of attacking a judgment." *United States v. Shaffer*, 789 F.2d 682, 687 n.5 (9th Cir. 1986); *accord United States v. Ostrer*, 422 F. Supp. 93, 95 (S.D.N.Y. 1976); *cf. Heflin v. United States*, 358 U.S. 415 (1959) (granting relief under Fed. R. Crim. P. 35 though relief was not available under § 2255). Sometimes only § 2255 is available.[4] On other occasions, a citizen may find that her only vehicle for obtaining relief is Rule 33.[5] In still other instances, both Rule 33 and § 2255 may be available.

[4] For example, Rule 33 by its terms only authorizes a motion for a new trial and thus is not available to challenge a conviction pursuant to a guilty plea. *See, e.g., Raineri,* 233 F.3d at 100 n.4.

[5] For example, § 2255 authorizes a motion only by a person "in custody." Similarly, courts will not entertain a § 2255 motion while an

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In this case, it was entirely proper for petitioner to raise his *Brady/Giglio* claim under Rule 33. In *Giglio* itself, this Court held that a defendant was entitled to a new trial based on new evidence that, contrary to a key government witness's testimony on cross-examination, a prosecutor had promised the witness he would not be prosecuted if he testified. The defendant had presented the new evidence in a Rule 33 motion for a new trial based on newly discovered evidence. *See Giglio v. United States*, 405 U.S. 150, 152 (1972). Similarly, in *United States v. Agurs*, 427 U.S. 97 (1976), the Court decided on the merits the defendant's claim that he was entitled to a new trial under *Brady* because of new evidence that the prosecution had failed to disclose impeachment material. *Id.* at 113-14. Once again, the evidence had been presented in a Rule 33 motion for a new trial based on newly discovered evidence. *See id.* at 100. The courts of appeals likewise have recognized that a claim of prosecutorial suppression of exculpatory or impeachment material, if based on newly obtained evidence that the defendant could not have obtained earlier through due diligence, is properly raised under Rule 33 in a motion for new trial based on newly discovered evidence. *See, e.g., United States v. Runyan*, 290 F.3d 223, 246-47 (5th Cir. 2002); *United States v. Josleyn*, 206 F.3d 144, 151-52 (1st Cir. 2000); *United States v. Frost*, 125

appeal is pending. *See* CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 597, at 483 & n.10 (2d ed. 1982), and cases cited therein. In contrast, when a Rule 33 motion is filed while an appeal is pending, the district court has "jurisdiction to entertain the motion and either deny the motion on the merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case." *United States v. Cronic*, 446 U.S. 648, 667 n.42 (1984).

F.3d 346, 382 (6th Cir. 1997); *United States v. Espinosa-Hernandez*, 918 F.2d 911, 913-14 (11th Cir. 1990); *United States v. Douglas*, 874 F.2d 1145, 1161, 1163 (7th Cir. 1989); *United States v. Kelly*, 790 F.2d 130, 135 (D.C. Cir. 1986) (Wald, J., joined by Scalia & Starr, JJ.).[6]

[6] Federal courts also have entertained a wide variety of other constitutional claims presented in motions under Rule 33 for a new trial based on newly discovered evidence, including claims of improper influence upon the jury, *see United States v. Endicott*, 869 F.2d 452, 457 (9th Cir. 1989); *Government of V.I. v. Joseph*, 685 F.2d 857, 863 n.3 (3d Cir. 1982); *United States v. Jones*, 597 F.2d 485, 488 (5th Cir. 1979); *Richardson v. United States*, 360 F.2d 366, 368 (5th Cir. 1966); *Holmes v. United States*, 284 F.2d 716, 719-20 (4th Cir. 1960), intrusion into confidential communications protected by the Sixth Amendment right to counsel, *see Kelly*, 790 F.2d at 136-38; *United States v. Disston*, 582 F.2d 1108, 1112 (7th Cir. 1978); *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953); *Coplon v. United States*, 191 F.2d 749, 756-57 (D.C. Cir. 1951), violation of the Fourth Amendment, *see United States v. Bascaro*, 742 F.2d 1335, 1344 (11th Cir. 1984); *United States v. Williams*, 737 F.2d 594, 616-17 (7th Cir. 1984), and incompetence to stand trial, *see United States v. McCarthy*, 54 F.3d 51, 55 (2d Cir. 1995). *See also Cronic*, 466 U.S. at 667 n.42; *United States v. Williams*, 613 F.2d 573, 575 (5th Cir. 1980); *United States v. Fuentes-Lozano*, 580 F.2d 724, 725-26 (5th Cir. 1978).

A recent Seventh Circuit decision, *United States v. Evans*, 224 F.3d 670 (7th Cir. 2000), treats a Rule 33 motion raising constitutional claims as a § 2255 motion, for purposes of the restrictions on second or successive motions, unless the motion is what the court calls "[a] *bona fide* motion for a new trial on the basis of newly discovered evidence motion." *Id.* at 673. Such a "*bona fide* motion," said the court, "does *not* contend that the conviction or sentence violates the Constitution or any statute." *Id.* at 673-74 (emphasis added). *Evans* is misguided and in any event does not assist the government here. First, Rule 33 refers generally to "newly discovered evidence," and nothing in its text remotely suggests that motions alleging constitutional violations are any less *bona fide* than motions not alleging such violations. Second, the opinion in *Evans* ignores decisions reaching back half a century that have entertained new-evidence motions alleging constitutional

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Neither the District Court nor the Court of Appeals conducted the kind of examination that should be required before any motion filed under another rule or statute can be treated as a motion under § 2255 for purposes of that statute's restrictions on multiple motions. In response to petitioner's initial post-conviction motion, the government asserted that "Castro's allegation of a *Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255 . . . . " J.A. 110. But neither the District Court nor the Court of Appeals considered – in any of their rulings in this case – whether the government could back up that assertion with *any* authority.

In short, the courts below never asked a question that should be asked before any recharacterization of a post-conviction motion – whether brought by a *pro se* prisoner or not – is ever held to bar a later motion under § 2255: Was the first motion properly brought under the rule or statute relied upon by the movant? In this case, the answer to that question is "Yes." Because petitioner's 1994 motion was properly brought under Rule 33, under no circumstances should it have been treated as a § 2255 motion, for purposes of the restriction on successive motions, without petitioner's consent.

violations. Third, the prisoner before the court in *Evans* appeared *pro se*. *See id.* at 672. The Seventh Circuit did not appoint counsel and therefore did not have the benefit of adversary briefing by counsel. Finally, the Seventh Circuit itself subsequently held that a motion treated as a § 2255 motion only by virtue of *Evans*'s judge-made rule does not count as a § 2255 motion for purposes of the restrictions on second or successive motions, where, as here, the movant was afforded no notice. *See Henderson v. United States*, 264 F.3d 709, 711 (7th Cir. 2001).

The mere preference of the government or the court to decide the 1994 motion under § 2255 as well Rule 33 affords no justification for barring a later motion under the statute. The United States Code and the Federal Rules of Criminal Procedure authorizes certain motions that may be brought by citizens who believe they were wrongfully convicted of a federal crime.[7] If a citizen properly files one of those motions, the court should not be permitted to foreclose the citizen from thereafter timely filing another authorized motion, by the court's action in imputing to the citizen, over objection, a request for relief under a provision that the citizen did not invoke. Absent the movant's consent, the most basic precondition for ever treating a motion filed under another provision as a motion under § 2255, for purposes of that statute's restrictions on successive motions, should be careful consideration of whether the motion could *only* be brought under § 2255.

C. Petitioner Was Not Afforded Notice of the District Court's Proposed Recharacterization or an Opportunity To Withdraw His Motion.

Even if petitioner's 1994 motion had not been a proper Rule 33 motion, the court's recharacterization of the motion could not justify dismissal of his 1997 motion, absent notice in 1994 that petitioner's motion would be recharacterized and an opportunity to withdraw it.

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[7] *See United States v. Prescott*, 221 F.3d 686, 689 (4th Cir. 2000) ("A variety of post-trial motions are available to prisoners and were available before the enactment of the AEDPA.").

Prior to AEDPA, courts sometimes treated *pro se* motions filed under other provisions as § 2255 motions in order to reach the merits of the claims presented. *See Raineri v. United States*, 233 F.3d 96, 97 (1st Cir. 2000) ("[C]ourts frequently have recharacterized inartfully drawn pleadings to assist pro se prisoners who mistakenly relied on inappropriate rules or statutes."). Whether a motion filed under another provision would be deemed a § 2255 motion depended on the circumstances and the practice of the court in which the motion was filed. For example, in *United States v. Jordan*, 915 F.2d 622 (11th Cir. 1990), a defendant proceeding *pro se* mistakenly relied upon Fed. R. Crim. P. 35(a) in contending that his offense of conviction was not punishable by a term of supervised release. *Id.* at 624. The Eleventh Circuit held that the defendant's claim was properly decided under § 2255. *Id.* at 625. In contrast, in *United States v. Warner*, 23 F.3d 287 (10th Cir. 1994), the Tenth Circuit declined to treat a motion under Fed. R. Crim. P. 32 as a § 2255 motion, "because it is apparent . . . that Defendant did not intend the motion to be so construed." *Id.* at 291.

AEDPA has required courts to rethink the proper approach to recharacterization because the statute prohibits consideration of a second or successive § 2255 motion except in limited circumstances. Whereas before AEDPA some courts routinely recharacterized *pro se* motions filed under other provisions as § 2255 motions, *see Adams v. United States*, 155 F.3d 582, 583 (2d Cir. 1998), nearly all the circuits have recognized that after AEDPA such an approach is not appropriate. Otherwise, "a conversion, initially justified because it harmlessly assisted the prisoner-movant in dealing with legal technicalities, may result in a disastrous deprivation of a future opportunity

to have a well-justified grievance adjudicated," *id.*, and prisoners "face losing potentially valid constitutional claims at the hands of judges who are applying a rule of liberal construction that was created to benefit pro se claimants." *United States v. Miller*, 197 F.3d 644, 649 (3d Cir. 1999).

Ten of the twelve circuits that hear criminal cases have concluded that AEDPA is not properly construed to permit dismissal of a § 2255 motion as second or successive, based on a prior recharacterization of a motion filed under another rule or statute, unless the movant (i) consented to the recharacterization or (ii) was given notice of the proposed recharacterization and an opportunity to withdraw the motion. *See Morales v. United States*, 304 F.3d 764, 767 (8th Cir. 2002); *United States v. Palmer*, 296 F.3d 1135, 1146 (D.C. Cir. 2002); *In re Shelton*, 295 F.3d 620, 622 (6th Cir. 2002); *United States v. Emmanuel*, 288 F.3d 644, 649 (4th Cir. 2002); *Henderson v. United States*, 264 F.3d 709, 710-11 (7th Cir. 2001); *United States v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000); *Raineri*, 233 F.3d at 100-101; *Miller*, 197 F.3d at 650-52; *Adams*, 155 F.3d at 584;[8] *see generally* Harvey Bartle, Comment, *One*

[8] Some of the cited decisions disagree on one issue not critical to the outcome here, i.e., whether courts should refrain from recharacterizing a post-conviction motion unless they follow procedures ensuring notice and an opportunity to withdraw, or may instead follow prior practices but simply not count, for purposes of the restrictions on second or successive motions, a motion recharacterized as a § 2255 motion without notice and an opportunity to withdraw. *Compare Ranieri*, 233 F.3d at 100 (declining to require district courts to use "a new protocol" in deciding initial post-conviction motions), *with, e.g., Miller*, 197 F.3d at 652 (specifying procedure for district courts to

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Bite at the Apple: The Effect of Recharacterization on Post-conviction Relief Under 28 U.S.C. § 2255, 75 TEMP. L. REV. 613 (2002). These decisions are sound, and the construction they adopt should be adopted by this Court as well.[9]

Once it is accepted that a motion should not be recharacterized without notice and an opportunity to withdraw the motion, a third basis for reversal of the Eleventh Circuit's decision becomes clear. At no time before the District Court decided petitioner's 1994 motion did the court notify petitioner of its intention to recharacterize his motion or give him an opportunity to withdraw the motion. Moreover, far from acquiescing in the government's request that his motion be recharacterized, petitioner unequivocally insisted he had properly filed the motion under Rule 33. Under these circumstances, petitioner's 1994 motion could not justifiably be counted as a motion

follow). Notwithstanding this one area of disagreement, these ten circuits concur that when a motion has been recharacterized as a § 2255 motion without notice to the prisoner, a later § 2255 motion is not a second or successive motion under the statute.

[9] Apart from the Eleventh Circuit's decision here, the only contrary decision is *In re Tolliver*, 97 F.3d 89 (5th Cir. 1996). In a one-page opinion issued less than six months after AEDPA was signed into law, the Fifth Circuit held that a prisoner's § 2255 motion was successive because the district court had construed his prior post-conviction motion "as a § 2255 motion, and granted the motion and ordered the relief sought," and "there is nothing else [the prior motion] could be" but a § 2255 motion. 97 F.3d at 90. The present case is distinguishable on both points. Petitioner was denied relief in 1994, and his motion was proper under Rule 33. Moreover, the opinion in *Tolliver* did not discuss the issue of notice and provided no reasoning that would support a general practice of counting a motion recharacterized as a § 2255 motion as a first § 2255 motion for purposes of the restrictions on second or successive motions.

under § 2255, even if petitioner's reliance on Rule 33 had been in error (which it was not).

In dismissing petitioner's 1997 motion as successive, the District Court reasoned that in 1994 petitioner had been "put on notice by the Government's response to his motion for a new trial . . . that his motion should be construed as a motion under § 2255 because of the constitutional claims that Petitioner raised in his motion." J.A. 183. But in reality petitioner had only been put on notice that *the government believed* petitioner's motion was "more properly cognizable" under § 2255. He was not put on notice that the motion *should be* construed as a motion under § 2255. For the government never came forward with any support for its contention. And although it would not have been sufficient in any event (given that petitioner was fully within his rights in electing to proceed solely under Rule 33), the District Court did not afford petitioner notice, before ruling on his motion, of its intention to recharacterize the motion as one under Rule 33 and § 2255, and give him an opportunity to withdraw the motion.

In interpreting the § 2244(b) restriction on second or successive habeas corpus applications, this Court has rejected proposed literal constructions that would have denied state prisoners the opportunity to have at least a single determination of their constitutional claims by a federal court. *See Slack v. McDaniel*, 529 U.S. 473, 485-90 (2000) (holding that a habeas petition filed after an initial petition was dismissed for failure to exhaust state remedies is not a second or successive petition); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-46 (1998) (holding that the restriction on second or successive habeas petitions did not apply to a habeas petition presenting a

constitutional claim that the petitioner had raised in a prior habeas petition, where the claim in the prior petition had been dismissed as premature). In both *Slack* and *Martinez-Villareal*, the Court emphasized that the rejected constructions would have barred any federal habeas review of the prisoner's claims. *See Slack*, 529 U.S. at 487 ("The proposed rule would bar the prisoner from raising nonfrivolous claims . . . , even though a federal court has yet to review a single constitutional claim."); *Martinez-Villareal*, 523 U.S. at 645 ("To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.").

This case is easier than *Slack* and *Martinez-Villareal*. Whereas in those cases the rejected interpretations at least could be said to be consistent with the statutory text, here the statutory interpretation implicit in the Eleventh Circuit's decision finds no support in the language of § 2255. *See* Part II.A, *supra*. Yet that interpretation, like the ones rejected in *Slack* and *Martinez-Villareal*, would bar petitioner from ever obtaining review under § 2255 of a potentially meritorious constitutional claim, one of sufficient substance to convince the Court of Appeals to issue a certificate of appealability when petitioner sought to appeal from the initial denial of his 1997 motion. J.A. 165.[10]

[10] This case does not present the situation where a defendant unsuccessfully litigates an issue under Rule 33 and then attempts to relitigate that same issue under § 2255. Petitioner's ineffective-assistance claim has never been fully adjudicated; it was initially

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The Court's statement in *Slack* that "the phrase 'second or successive petition' [in § 2244(b)] is a term of art given substance in our prior habeas corpus cases," 529 U.S. at 486, is also significant. The phrase "second or successive motion" in § 2255 presumably is likewise to be viewed as a term of art given substance by prior case law. None of this Court's pre-AEDPA § 2255 cases support dismissal of a § 2255 motion, on the basis of a prior motion brought under a different rule or statute and recharacterized over objection and without notice.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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decided by the District Court in 1998, but that decision was vacated by the Court of Appeals because the wrong legal standard was used.